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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SALVADOR AGUILAR et al.,

Plaintiffs and Appellants,

v.

CALIBER HOME LOANS,  
INC.,

Defendant and Respondent.

2d Civ. No. B295210  
(Super. Ct. No. 56-2016-  
00483417-CU-OR-VTA)  
(Ventura County)

Borrowers sued lender for wrongful foreclosure, claiming lender breached its contract to provide a permanent loan modification. Lender obtained summary judgment. We affirm.

**FACTS**

In August 2006, Salvador and Marta Aguilar borrowed \$365,000 from JPMorgan Chase Bank, N.A. (Chase) secured by a trust deed on their Oxnard home.

*Prior Loan Modification*

In 2009 the Aguilars were in default, and applied for a loan modification from Chase. In January 2010, Chase granted the

Aguilars a loan modification that lowered their payments to \$922.67 per month for five years. In November 2012, the Aguilars defaulted again.

Caliber Home Loans, Inc. (Caliber) started servicing the Aguilars' loan in April 2013. In May 2013, the Aguilars submitted a loan modification application to Caliber. Caliber denied the application.

In July 2013, Chase assigned the beneficial interest in the loan to Caliber.

#### *Loan Modification at Issue*

In July 2013, Caliber notified the Aguilars that their loan was significantly delinquent, but that they were approved for a "Streamlined Modification Trial Period Plan" (TPP).

The TPP required the Aguilars to make three monthly payments of \$1,044.97 each, beginning August 1, 2013. It also required the Aguilars to qualify for a permanent loan modification. It provided, "Any pending foreclosure action or proceeding that has been suspended may be resumed if you fail to comply with the terms under the Trial Period Plan or do not qualify for a permanent modification."

The Aguilars made their first payment under the TPP in August 2013 by electronic transfer. Shortly thereafter, Caliber realized that due to a mistake in interest calculation, the TPP was issued in error. The Aguilars would not qualify for the permanent loan modification.

On August 8, 2013, Caliber sent the Aguilars a letter stating that the TPP was issued in error, and that the Aguilars did not qualify for the TPP. Caliber enclosed its check returning the \$1,044.97 the Aguilars had paid. The Aguilars cashed Caliber's check.

### *Subsequent Attempts*

In October 2013, the Aguilar family applied to Caliber for another loan modification. Caliber denied the application due to the Aguilar family's inability to afford the modified payments.

In April 2014, Caliber offered the Aguilar family a new TPP. The monthly payment would be \$2,011.44, only marginally greater than the interest-only payments of \$1,939.07 in the original note. The Aguilar family did not respond.

In September 2015, the Aguilar family's home was sold at a foreclosure sale to a third party for \$307,100. Other than the \$1,044.97 tendered by the Aguilar family, Caliber had never received any payment on the loan.

### I.

### *Summary Judgment*

The trial court must grant a motion for summary judgment if all the papers submitted show there is no triable issue of a material fact. (Code Civ. Proc., § 437c, subd. (c).) The moving party must support the motion with evidence, including affidavits, depositions, and matters of which judicial notice must or may be taken. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) If the moving party's evidence shows there is no triable issue of material fact, the burden shifts to the opposing party to produce evidence that raises a triable issue. (See *Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 392.) Our review is de novo. (*Ibid.*)

## II.

### *Breach of Contract*

The Aguilaras contend Caliber's undisputed facts failed to eliminate their cause of action for breach of contract.

The Aguilaras argue that the TPP constitutes a valid contract. Caliber does not contest that. Instead, Caliber has shown it did not breach the contract.

The TPP contained two conditions: make three monthly payments of \$1,044.97 each and qualify for a permanent loan modification. Assuming the Aguilaras would have made the monthly payments, it is undisputed that the Aguilaras would not qualify for a permanent loan modification under the Streamlined Modification Program, the program under which the TPP was offered. A plaintiff has no cause of action for breach of contract when the plaintiff fails to satisfy a condition precedent contained in the contract. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1389.) Qualifying for a permanent loan was a condition precedent contained in the contract. As soon as Caliber realized the Aguilaras would not qualify for a permanent loan modification, it returned their payment and canceled the contract.

The Aguilaras argue that Caliber failed to prove all of the elements of unilateral mistake as a basis for rescinding the contract. But Caliber is not relying on unilateral mistake. It is relying on the Aguilaras' failure to satisfy a condition precedent to the contract: qualifying for a permanent modification.

The Aguilaras claim that Caliber's motion for summary judgment did not eliminate the doctrine of promissory estoppel. The doctrine of promissory estoppel provides a basis for the enforcement of a promise made without consideration. (*Raedeke*

*v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 672.)

The elements of promissory estoppel are: (1) a promise clear and unambiguous in its terms; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) injury resulting from the reliance. (*Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 225.)

The promise must be clear and unambiguous so that the trial court can enforce it according to its terms. The doctrine of promissory estoppel does not allow the court to change the terms of the promise. It appears the Aguilers believe that all they had to do to obtain a permanent loan modification was make three monthly payments. But that is not what Caliber promised. Caliber promised a permanent loan modification provided that the Aguilers made three monthly payments *and* qualified for the permanent loan modification. The Aguilers did not qualify. The court cannot enforce a promise Caliber did not make.

Nor can the Aguilers rely on the implied covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing exists to prevent one party from unfairly frustrating the other party's right to receive the benefits of the agreement the parties made. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349.) But it cannot create obligations not contemplated in the contract. (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1032.) Here the contract required the Aguilers to qualify for a permanent loan modification. They did not do so.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

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GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Henry J. Walsh, Judge

Superior Court County of Ventura

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NT Law and Julie N. Nong for Plaintiffs and  
Appellants.

Perkins Coie, David T. Biderman and Aaron R.  
Goldstein for Defendant and Respondent.